

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-4253

To be argued by
RICHARD F. WEBB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-4253

MIANUS RIVER PRESERVATION COMMITTEE,
FRANK E. WOLF, CHARLES H. BIEDERMAN,
and ROBERT D. HENKLEIN,

Petitioners,

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION
AGENCY, and COMMISSIONER, STATE OF
CONNECTICUT, DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

Petition for Review of NPDES Permit
Modification Issued by Respondents

BRIEF OF RESPONDENT,
COMMISSIONER, STATE OF CONNECTICUT,
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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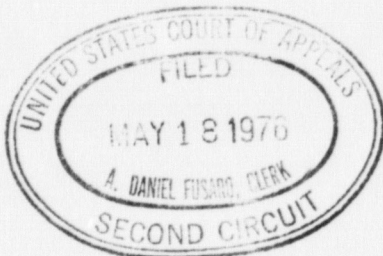


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I

PRELIMINARY STATEMENT

The petitioners seek a review of a modification of a National Pollution Discharge Elimination System permit (NPDES permit hereafter).

This permit, No. CT0001325 (Rec. II), ^{1/}was issued by the respondent, Commissioner of Environmental Protection, State of Connecticut (respondent Commissioner hereafter) through his designated agent, Robert B. Taylor, under authority of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA hereafter), P.L. 92-500, 33 U.S.C. §1251 et seq.

The modified permit to which petitioners are taking exception was issued to the Greenwich Water Comapny on August 26, 1975, following a public hearing held on June 25, 1975.

The modified permit requires the Greenwich Water Comapny to direct all discharges into the Town of Greenwich wastewater collection system on or before July 31, 1978.

On September 29, 1975, the Town of Greenwich was ordered to construct sewers, pumping stations and the necessary appurtenances to sewer the North Mianus area by Order No. 1949. The sewers constructed under this order would serve the Greenwich Water Company.

^{1/} As used herein, Rec., with Roman numeral, refers to the document filed as part of the administrative record and listed on the Index to Administrative Record as filed.

II

STATEMENT OF ISSUES

1. Is NPDES permit No. CT0001325, dated August 26, 1975, a proper and valid permit?

2. Does 33 U.S.C. §1369(b)(1) grant jurisdiction to this Court to review the actions of the State in issuing an NPDES permit?

III

STATEMENT OF THE CASE

A. Statutory Scheme

33 U.S.C. §1311(b) sets two phases of effluent limitations to be achieved by July 1, 1977 and July 1, 1983, respectively, and which shall require the application of the best practicle control technology currently available as defined by the Administrator pursuant to 33 U.S.C. §1314(b). The effluent limitations are implemented through the requirement that individual point sources obtain NPDES permits issued under 33 U.S.C. §1342. Compliance schedules to assure phased compliance with the effluent limitations by the dates set forth in 33 U.S.C. §1311(b) are to be included in the NPDES permit under regulations set out at 40 C.F.R. §124.44. Guidelines for effluent limitations for classes and categories of point sources are to be published as

set forth in 33 U.S.C. §1314(b). The guidelines give substance to and aid in the establishment of the effluent limitations in 33 U.S.C. §1311(b). This will ensure a uniformity in application of permit conditions for all state and federal permit programs.

33 U.S.C. §1342 requires any discharge of any pollutant after December 31, 1974 to be under an NPDES permit. That section contemplates state responsibility for issuing permits, once a state program has been approved by the Administrator of the Environmental Protection Agency. State issued NPDES permits are to be conditioned in accordance with regulations promulgated by the Administrator and set out in 40 C.F.R. §124.44. In accordance with that regulation, and prior to the promulgation of effluent limitations under 33 U.S.C. §§1311, 1312, 1316 and 1317, the director of a state program is instructed merely to impose such terms and conditions in each permit as he determines are necessary to carry out the provisions of the Act.

33 U.S.C. §1370 gives a state the right to adopt any standard or limitation respecting discharges of pollutants as long as either no federal effluent limitation or standard is in effect under the FWPCA or the state standard or limitation is more stringent than the effluent limitation or standard in effect under the FWPCA.

B. Situation as of June 25, 1975

The NPDES permit dated March 10, 1975, (Rec. II), required the Greenwich Water Company to construct on site treatment facilities by July 31, 1977, or in the alternative, connect the sludge discharge to the sanitary sewer system of the Town of Greenwich by the same date.

The estimated cost of the on site treatment facility was \$750,000 as of June, 1975 (Rec. VII J, VII K, VII N). There was an estimated \$120,000 annual cost involving the treatment facility (Rec. VII K). The estimated time to construct the on site treatment facility was eighteen to twenty-four months (Rec. VII K, I). The treated effluent from the treatment facility would discharge into the Mianus River (Rec. V B) approximately 250,000 gallons per day and would still contain the same pollutants, but to a lesser degree (Rec. II). That discharge, treated or untreated, was the only discharge in the upper reach of the Mianus River (Rec. V B). The Greenwich Water Company was experiencing financial problems, which affected its ability to borrow funds (Rec. VII N, p. 7).

The discharge from the Greenwich Water Company consisted of the additives alum, lime, chlorine, polymers, carbon powder and suspended solids removed from the water purified. All of the additives are amenable to the sewage plant treatment process.

Polymers and chlorine are used daily at the sewage plant. Alum and lime are used to condition sludge at the sewage plant. The hydraulic load could be handled by staging the discharge during low flow periods at the sewage plant. The solids load on the sewage plant would be negligible. (Rec. III O). The Water Company in the NPDES permit in dispute (Rec. I) is ordered to construct holding tanks to allow the discharge into the Greenwich sanitary system during off-peak hours. The best method for handling the discharge from the Greenwich Water Company is by the connection with the sanitary sewer when built. (Rec. V B, VII K, p. 9). There was a need for sewers in the North Mianus area of Greenwich (Rec. IX, X).

C. Decision of Hearing Examiner based on Record

The hearing examiner of the June 25, 1975 public hearing found a need for sanitary sewers in the North Mianus area of Greenwich which necessitated the issuing of an order for such facilities to the Town of Greenwich (Rec. V B). Such an order was issued on September 29, 1975 and is known as State Order No. 1949.

It was the opinion of the hearing examiner, partly on the basis of the record as listed above, that the NPDES permit to

Greenwich Water Company be modified to require the elimination of any discharge into the Mianus River by connection to the sanitary sewer on or before July 31, 1978 (Rec. V B). The hearing examiner's report and recommendations were approved by the Director of the State program (Rec. V A).

ARGUMENT

I

NPDES PERMIT NO. CT0001325, DATED AUGUST 26, 1975, IS A PROPER AND VALID PERMIT.

The petitioners in their brief make the assertion that the modified permit dated August 26, 1975 is invalid because it does not require the application of the best practicable control technology currently available by July 1, 1977. They cite 33 U.S.C. §1311(b)(1)(A) as their authority. Their assertion, however, is overbroad, not supported by the record, and fails to incorporate the entire statutory scheme set forth in the FWPCA into this matter.

33 U.S.C. §1311(b)(1)(A) states, in part,

"[i]n order to carry out the objective of this chapter there shall be achieved not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title,"

33 U.S.C. §1314(b) authorizes the respondent Administrator to adopt effluent limitation guidelines. These guidelines refer back to 33 U.S.C. §1311(b)(1). To date no such limitations or guidelines have been promulgated for water purification plants

by the respondent Administrator.

Absent effluent limitation guidelines assessing the best practicable control technology currently available under 33 U.S.C. §1314(b)(1) and effluent limitations under 33 U.S.C. §1311(b)(1), the respondent Commissioner modified the permit after the June 25, 1975 public hearing in accordance with applicable law. He imposed such terms and conditions in the modified permit as he determined are necessary to carry out the provisions of the Act.^{2/} Under the authority of 33 U.S.C. §1370, the respondent Commissioner, absent a federal limitation or guideline, could adopt any standard or limitation respecting the water company discharge. This he did by the effluent parameters contained in the modified permit. These parameters would apply until the discharge was eliminated completely by its connection with the town sanitary sewer system.

^{2/} 40 C.F.R. §124.44.

ARGUMENT

II

33 U.S.C. §1369(b)(1) DOES NOT GRANT JURISDICTION TO THIS COURT TO REVIEW THE ACTIONS OF THE STATE IN ISSUING AN NPDES PERMIT.

The respondent Commissioner filed a Motion to Dismiss for lack of subject matter jurisdiction. In their response to this motion, petitioners make much of the argument that if this Court does not have jurisdiction, then they have been denied a right of appeal in Connecticut courts of the modified permit.

It is true that petitioners would have no available appeal of that permit in state court. However, it is not true that they have the right of appeal in any court, state or federal.

Except where the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses. Estep v. U.S. 66 S.Ct. 423, 327 U.S. 114, 9 L.Ed. 567 (1946); Fitzgerald v. Douds, 167 F.2d 714 (2d Cir. 1948). The same rule holds true under Connecticut law.^{3/}

Petitioners do have a right to due process. Any right they may have had in that regard was satisfied by their participation in the June 25, 1975 public hearing.^{4/}

^{3/} See, e.g., Sheridan v. Planning Board, 159 Conn. 1, 266 A.2d, 396 (1969).

^{4/} Rec. IV and Rec. VI.

The real issue, however, is whether 33 U.S.C. §1369(b)(1) gives petitioners a right of judicial review of the respondent Commissioner's action in modifying the NPDES permit.

33 U.S.C. §1251(d) states that

" . . . except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in chapter call "Administrator") shall administer this chapter."

33 U.S.C. §1362 gives a definition for the term "State" and "State water pollution control agency."

33 U.S.C. §1369(b)(1) provides for review of the Administrator's action. It does not provide for the review of an action of the Administrator or State or State water pollution control agency

In this matter, petitioners bring the NPDES permit dated August 26, 1975 into question, presumably under authority of 33 U.S.C. §1369(b)(1)(F) for issuing a permit under §1342. However, the Administrator has approved the State program. The State has authority to issue or deny NPDES permits. The State in this matter issued the original permit and the subsequent modifications, not the Administrator.

Since the State and Administrator are not the same either by statutory definition or by duties given by the FWPCA, it must

be that the singular use of Administrator in 33 U.S.C. §1369 (b)(1) does not include State as petitioners would have this Court believe. At 33 U.S.C. §1342(b)(5), for example, the term "State" is used and in parentheses, the term "Administrator". Such is not the case in 33 U.S.C. §1369(b)(1).

Since 33 U.S.C. §1369(b)(1) provides for judicial review only of the Administrator's action in issuing a permit under 1342, it is respectfully submitted that this Court does not have jurisdiction to review the action of the State in issuing a permit under 1342.

III

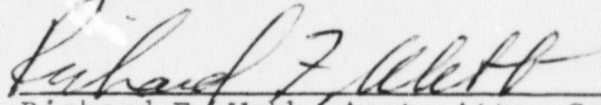
CONCLUSION

The arguments above respectfully show that:

1. This Court is without jurisdiction to review the permit issued by the respondent Commissioner dated August 26, 1975;
2. Even if this Court does have jurisdiction to review that permit, it was a proper and valid permit and petitioners' Petition for Review should be dismissed.

Respectfully submitted,

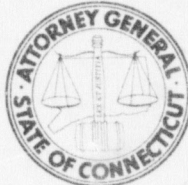
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May 12, 1976

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Clerk
United States Court of Appeals
Second Circuit
New York, New York 10007

Re: Mianus River Preservation Committee, et al. v.
Environmental Protection Agency, No. 75-4253

Dear Sir:

Please find enclosed herein ten copies of the brief of Respondent Commission, State of Connecticut, Department of Environmental Protection.

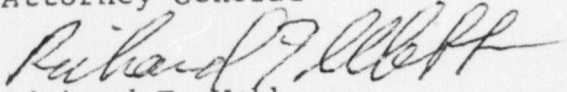
It is hereby certified that two copies of the brief have this date been served upon the attorneys of record by First Class mail as follows:

Paul M. Kaplow, Esquire
Assistant Attorney General
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Very truly yours,

Carl R. Ajello
Attorney General

By: 
Richard F. Webb
Assistant Attorney General

RFW: inm
Enclosures
cc - Paul M. Kaplow, Esquire
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